UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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STEVAN VALADEZ,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, DOES 1 through 20, inclusive,

Defendants.

NO. CIV. S-03-0433 WBS GGH

MEMORANDUM AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

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Plaintiff brings this action against defendant Regents of the University of California ("the Regents")[1] alleging: (1) retaliation in violation of the First Amendment under 42 U.S.C. § 1983; (2) discrimination and harassment against a veteran in violation of the Uniformed Services Employment and Re-employment Rights Act, 38 U.S.C. §§ 4301 et seq. ("the USERRA"); and (3)

[1] Although the case caption references several "Does," plaintiff has not amended his complaint to add the names of any person other than the Regents. Also notable is that plaintiff addresses only his claims against the Regents in his opposition to defendant's motion for summary judgment. Therefore, the court analyzes plaintiff's claims as applying only to the Regents as the lone defendant in this case.

other state-law claims.[2] Plaintiff also argues that his complaint raises a federal claim under the Family Medical Leave Act (29 U.S.C. § 2601 et seq. ("the FMLA")), though defendant denies this. The court has jurisdiction based on 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367 (supplemental jurisdiction). The Regents now move for summary judgment on all plaintiff's claims pursuant to Federal Rule of Civil Procedure 56.

I. Factual and Procedural Background[3]

Plaintiff initially filed a complaint in this court against defendant on or about June 17, 2002. On September 26, 2002, both parties stipulated to dismiss that action without prejudice. An order approving the stipulation was signed by Judge Levi on October 17, 2002. Thereafter, plaintiff re-filed the instant action in the Superior Court of California in and for the County of Sacramento on November 15, 2002. Defendant filed an answer to plaintiff's state-court complaint on February 24, 2003. On March 5, 2003, defendant removed this case to this court pursuant to 28 U.S.C. § 1441(b).

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[2] These claims include: (1) race discrimination and harassment under the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940; (2) disability discrimination and harassment under the FEHA; (3) retaliation under the FEHA; (4) violation of the California Family Rights Act, Cal. Gov't Code § 12945.2; and (5) whistle-blower retaliation in violation of the California Labor Code § 1102.5.

[3] All of these facts are undisputed. (See Def.'s Separate Statement of Undisputed Material Facts in Supp. of Mot. for Summ. J. ¶¶ 1-5).

II. Discussion

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

A. Plaintiff's Complaint Does Not State a Federal Claim Under the FMLA

In plaintiff's response to defendant's separate statement of undisputed material facts in support of defendant's motion for summary judgment, ("Pl.'s Resp. to Def.'s SUF"), plaintiff asserts that there is a dispute as to whether his complaint raises a federal claim against defendant under the FMLA. (Pl.'s Resp. to Def.'s SUF ¶ 6). However, defendant correctly points out that there is no legitimate dispute on that question.

Plaintiff's complaint does mention "the Family Medical Leave Act" in the caption of her fifth claim for relief. (Acero Decl., Ex. GG (Pl.'s Compl.) at 8). However, allegation 43 of plaintiff's complaint, which allegedly supports this claim for relief, states only that "Plaintiff was and is at all times herein an employee covered by [what plaintiff refers to as] the State Family Medical Leave Act" (Id. ¶ 43)(emphasis added), which

defendant evidently interpreted to mean the California Family Rights Act, Cal. Gov't Code § 12945.2. Plaintiff makes no allegation anywhere in his complaint that he was covered by the federal Family Medical Leave Act and never cites the federal statute. (See Acero Decl., Ex. GG (Pl.'s Compl.).

Furthermore, plaintiff's counsel signed the parties' joint status report, which report specifically states that "[p]laintiff will seek court approval to amend his complaint to allege under federal law . . . [a] [v]iolation of the Family Medical Leave Act/Retaliation (29 U.S.C. § 2601)." (See Joint Status Report signed and dated May 22, 2003 at 3). Plaintiff would have no need to seek leave to amend his complaint to assert a claim that was already included in his complaint. Therefore, this unchallenged statement in the joint status report is tantamount to an admission that plaintiff's complaint does not state a federal claim under the FMLA.

This interpretation of plaintiff's complaint is further bolstered by other statements in the joint status report regarding the nature of plaintiff's claims and the grounds for federal jurisdiction over this case. In the section of the report detailing a summary of plaintiff's claims, there is mention of an allegation that "[d]efendant refused to provide [plaintiff] with appropriate family or medical leave as required by California statutes . . . ," but no mention of a refusal to provide plaintiff with any leave required by the FMLA. (Id. at 2)(emphasis added). The joint status report also specifically states that federal jurisdiction for this case arises under the Federal Civil Rights Act of 1876 (42 U.S.C. § 1983) and the

USERRA (38 U.S.C. §§ 4301 et seq.). (See id. at 4). Nowhere in the joint status report is there any reference to federal jurisdiction based on the FMLA.

Plaintiff's response to defendant's telling citation to the joint status report is simply that "defendant prepared it." (Telfer Decl. ¶ 21). Plaintiff does not dispute that his counsel signed the joint status report. Nor does he explain why he never took issue with the reading of his complaint memorialized in that report until now. Furthermore, plaintiff had ample time to seek leave to amend his complaint to include a federal claim under the FMLA, but failed to do so. His eleventh-hour request to have the court read an amendment into his complaint now, at the summary judgment stage, asks too much. See Gilmour v. Gates, McDonal & Co., 382 F.3d 1312, 1315 (11th Cir. 2004)("A plaintiff may not amend [his] complaint through argument in a brief opposing summary judgment."); Grayson v. O'Neill, 308 F.3d 808, 817 (7th Cir. 2002)(same). Granting plaintiff's request would also unduly prejudice defendant and likely compel the court to readjust its scheduling order. See DCD Programs Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)(leave to amend may be denied if it would cause opposing party undue prejudice or is sought in bad faith or after undue delay). Therefore, the court finds that plaintiff's complaint does not state a federal claim under the FMLA.

B. First Amendment Claim Under § 1983

Plaintiff states in his opposition that he does not oppose the denial of his claim under 42 U.S.C. § 1983. (Pl.'s Opp. to Def.'s Mot. for Summ. J. at 1). Because defendant's motion for summary judgment as to this claim is unopposed, the

court will grant summary judgment as to the claim. See Henry v. Gill Indus., Inc., 983 F.2d 943, 950 (9th Cir. 1993)(unopposed motion for summary judgment may be granted where moving party's papers are sufficient to support motion on their face).

C. USERRA Claim

Defendant argues that plaintiff's USERRA claim is not properly before this court for two reasons: (1) the court lacks subject matter jurisdiction over the claim; and (2) the claim is barred by the Eleventh Amendment (See Embury v. Kings, 361 F.3d 562 (9th Cir. 2004)). Plaintiff argues that the court has subject matter jurisdiction over the claim under USERRA and that defendant waived any Eleventh Amendment immunity when it removed this case to federal court. However, the court notes that the Eleventh Amendment question will be moot if the court determines that it lacks jurisdiction over the claim in the first instance. See Velazquez v. Frapwell, 165 F.3d 593, 594 (7th Cir. 1999)(vacating prior decision based on Eleventh Amendment immunity and dismissing USERRA claim against state employer where amendment to USERRA statute established lack of jurisdiction over claim). Therefore, the court will address defendant's argument regarding subject matter jurisdiction first.

Defendant removed this case pursuant to 28 U.S.C. § 1441(a). Under § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may [generally] be removed by the defendant . . . to the [proper] district court of the United States. . . ." However, "[t]he remand statute, 28 U.S.C. § 1447(c), requires a district court to remand a removed 'case' to

state court 'if at any time before final judgment it appears that the district court lacks subject matter jurisdiction.'" Lee v. Am. Nat'l Ins. Co., 260 F.3d 997, 1006 (9th Cir. 2001).

Plaintiff is a person, and there is no dispute that defendant is a state employer. See Velazquez, 165 F.3d at 593(treating Trustees of Indiana University as state employer under USERRA where court found Trustees to be arm of state); BV Eng'g v. University of Cal., 858 F.2d 1394, 1395 (9th Cir. 1988) (both University of California and its Board of Regents are arms of state). Federal courts generally lack jurisdiction over USERRA claims brought by persons against state employers. This is because Congress amended a section of the USERRA in 1998 in a way that "unmistakably" evidences "Congress' intention to limit USERRA suits [brought by persons] against states to state courts. . . ." Velasquez, 165 F.3d at 594(interpreting 38 U.S.C. § 4323(b)(2) in context of claim brought by person against state employer); see also Dew v. United States, 192 F.3d 366 (2d Cir. 1999)(38 U.S.C. § 4323(b) grants state courts jurisdiction over USERRA claims brought by persons against state employers); Larkins v. Dep't. of Mental Health, State of Ala., 1999 U.S. Dist LEXIS 9137 *3-5 (D. Ala. Feb 3, 1999)(state court is now proper forum for USERRA claims brought by persons against state employers).

None of the authorities cited above addressing the proper forum for a USERRA claim brought by a person against a state employer are binding on this court, and the Ninth Circuit has yet to reach the issue. However, an examination of the text of 38 U.S.C. § 4323 and the changes Congress made to that text in

1998 persuades this court that the authorities cited reach the correct conclusion. As noted in Larkins, 1999 U.S. Dist. LEXIS at *3, prior to the 1998 amendment to § 4323, federal district courts had jurisdiction over all USERRA claims against state employers regardless of the plaintiff's status. See also 38 U.S.C. § 4323, legislative notes(38 U.S.C. § 4323(b) used to allow "an action against a State as an employer" to be brought in "any district in which the State exercise[d] any authority or carrie[d] out any function."). This changed with the 1998 amendment.

In that amendment, Congress clearly made the proper forum for USERRA claims dependent on who sued whom. The amended statute specifically grants federal district courts jurisdiction over USERRA claims brought by the United States against both state and private employers and claims brought by persons against private employers.[4] However, "[i]n the case of an action against a State (as an employer) by a person, . . ." the postamendment statute states only that ". . . the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2)(emphasis added).

One might argue that the permissive language used in §

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[4] In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

38 U.S.C. § 4323(b)(1)(emphasis added).

In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

38 U.S.C. § 4323(b)(3)(emphasis added).

4323(b)(2) was not meant to exclude a person from bringing a USERRA claim against a state employer in federal court. However, this argument is effectively defeated by the fact that, in the course of amending the statute, Congress removed the language from the preamendment statute allowing all actions against state employers to be brought in qualifying district courts. See 38 U.S.C. § 4323, legislative notes(listing previous text of 38 U.S.C. § 4323(b)). The argument is further undermined by the fact that the postamendment statute delimits venue only for USERRA claims brought either by the United States against a state employer or by anyone against a private party. See 38 U.S.C. § 4323(c).[5] Venue for USSERA claims brought by persons against state employers is conspicuously absent from the statute. Id. This omission makes sense when one considers that questions of venue are irrelevant to courts that lack subject matter jurisdiction over a given case. Therefore, the court interprets § 4323(b)(2) in accordance with the other courts that have reached the issue and concludes that federal district courts lack original jurisdiction over USERRA claims brought by persons against a state employer.

Nevertheless, in this case, it is clear that the court

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[5] Venue.-(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

38 U.S.C. § 4323(c)(emphasis added).

had jurisdiction over plaintiff's § 1983 claim which arose under federal law. See 38 U.S.C. § 1331(granting federal courts original jurisdiction over all claims arising under laws of United States). In cases like this one, where a court has federal jurisdiction over one of several claims comprising a single case, a jurisdictional bar against another claim does not deprive the court of jurisdiction over the case. See Lee, 260 F.3d at 1002-1003("[T]he presence of at least some claims over which the district court has original jurisdiction is sufficient to allow removal of an entire case, even if others of the claims alleged are beyond the district court's power to decide."). However, where a given claim is barred by federal law, the court may remand that claim to state court. See Kruse v. Hawaii, 68 F.3d 331, 334-35 (9th Cir. 1995)(adopting Sixth Circuit's reasoning in Henry v. Metro. Sewer Dist., 922 F.2d 332 (6th Cir. 1990), justifying postremoval remand of claims barred by Eleventh Amendment and retention of other nonbarred federal claims).

The court is aware of a district court decision in this Circuit which held that, where there is an independent basis for federal jurisdiction, a district court may exercise supplemental jurisdiction over a federally-created claim over which state courts were given sole jurisdiction, even after dismissal of all other nonbarred federal claims. Kinder v. Citibank, 2000 U.S. Dist. LEXIS 13853 *9 (S.D. Cal. Sep. 14, 2000). However, the court can find no Ninth Circuit or other authority requiring the court to exercise such jurisdiction.

Because Congress has explicitly given state courts sole jurisdiction over USERRA claims brought by persons against state

employers, the court determines that it would be unseemly to exercise supplemental jurisdiction over plaintiff's USERRA claim. Therefore, the court will exercise its discretion to remand plaintiff's USERRA claim to state court. Having thus resolved the jurisdictional issue, the court need not address the parties' arguments regarding waiver of Eleventh Amendment immunity.

D. State-Law Claims

Following the final disposition of all federal claims in an action that includes pendent state claims, "[i]t is generally within a district court's discretion either to retain jurisdiction to adjudicate the pendent state claims or to remand them to state court." Harrel v. 20th Century Ins., 934 F.2d 203, 205 (9th Cir. 1991)(citations omitted). Both plaintiff's federal claims have been disposed of in this action. Because California courts are a better forum for resolving plaintiff's state-law claims, the court will remand those claims to state court.[6]

IT IS THEREFORE ORDERED that:

(1) defendant's motion for summary judgment as to plaintiff's § 1983 claim be, and the same hereby is, GRANTED; and

(2) plaintiff's USERRA claim and remaining state-law claims be, and the same hereby are, REMANDED to state court.

DATED: June 29, 2005

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

[6] Because the court has disposed of all plaintiff's claims on jurisdictional grounds, it need not reach the substance of plaintiff's evidentiary objections, which only go to the merits of her claims.